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No. 87-1465

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

ANTHONY FRANK PICCOLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

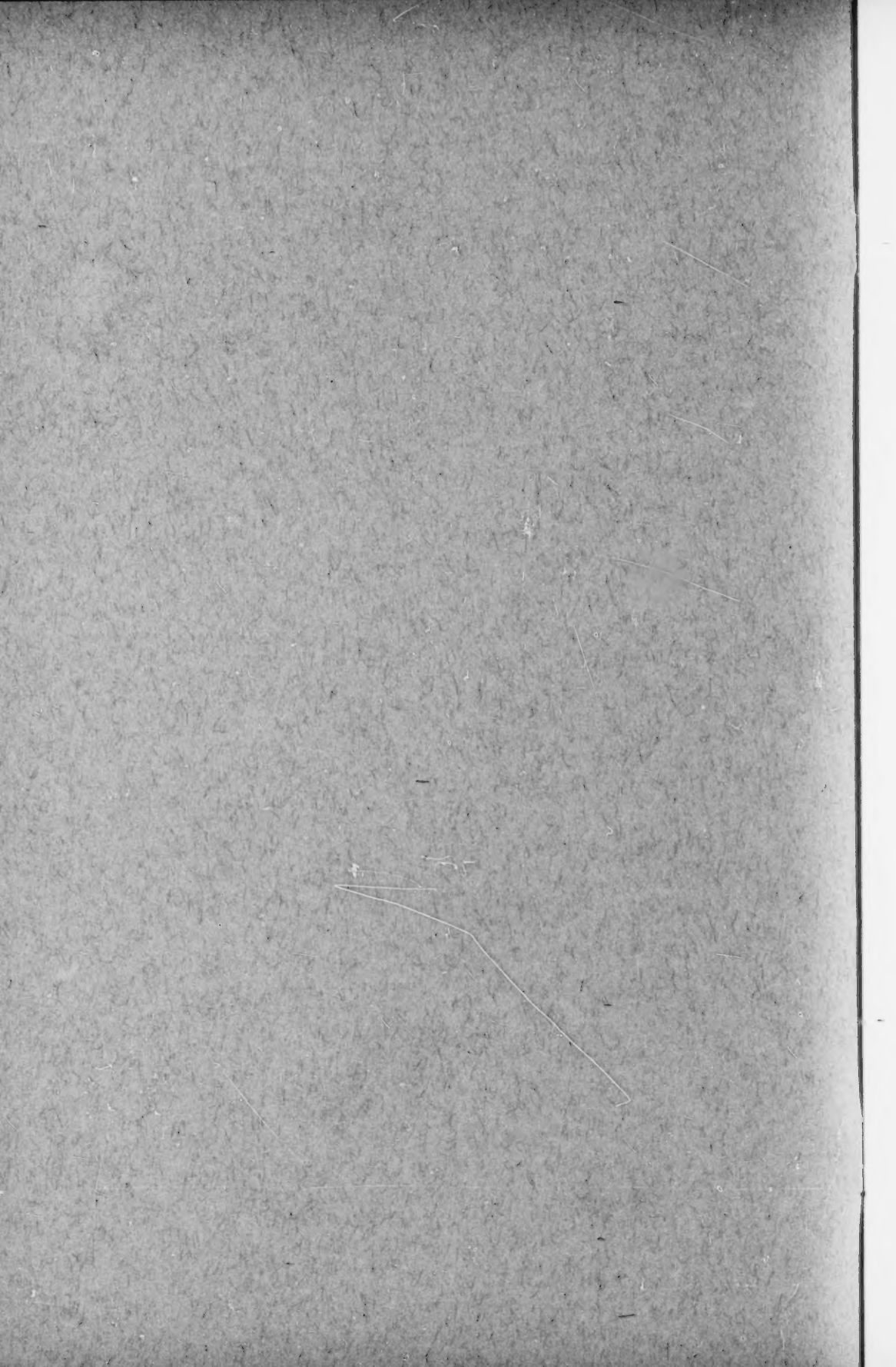
BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SARA CRISCITELLI
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*



QUESTION PRESENTED

Whether the jury instructions permitted petitioner's conviction for conduct that, under *McNally v. United States*, No. 86-234 (June 24, 1987), does not violate the federal mail fraud statute.



TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

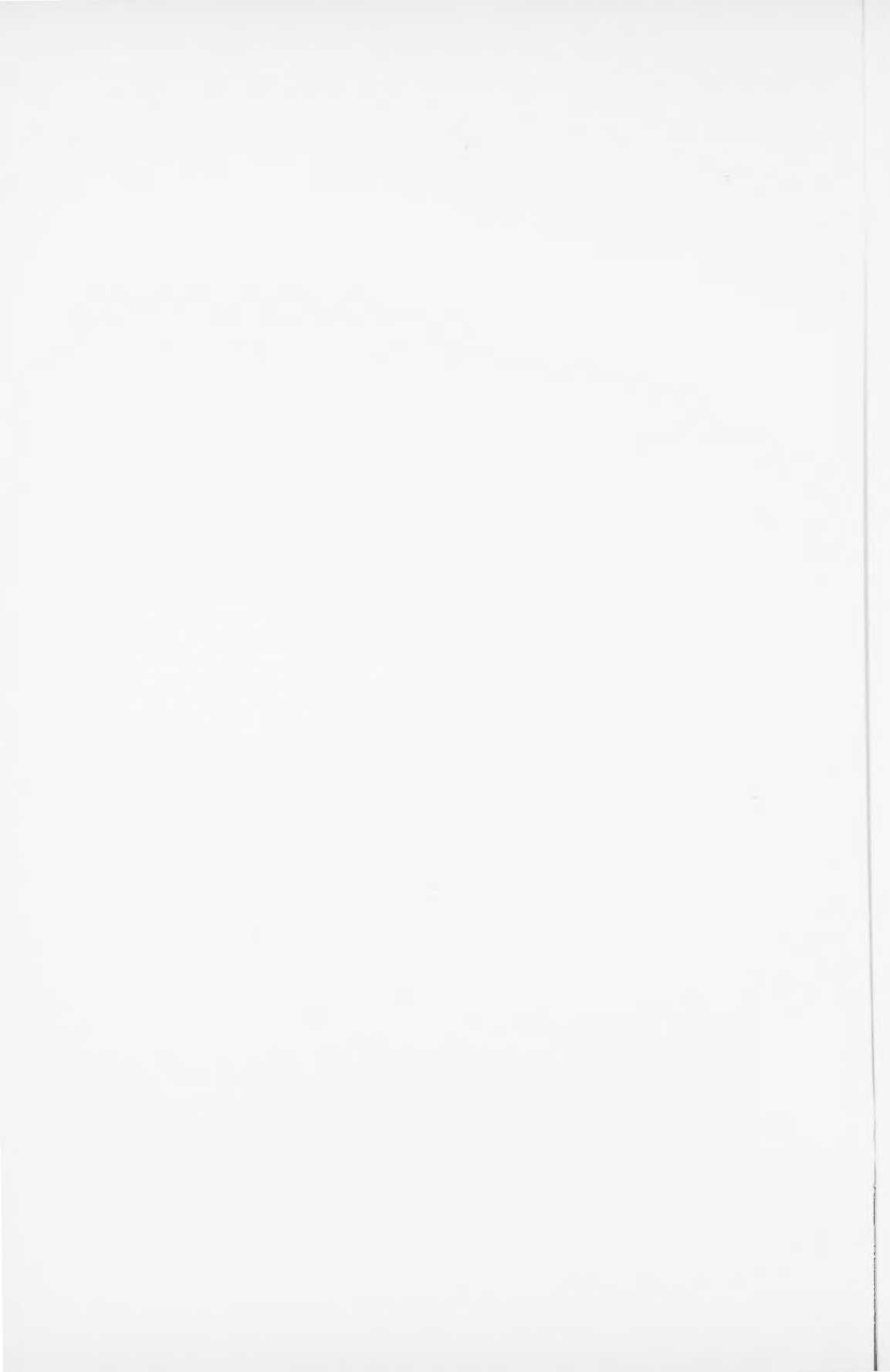
TABLE OF AUTHORITIES

Cases:

<i>Carpenter v. United States</i> , No. 86-422 (Nov. 16, 1987) ..	5
<i>McNally v. United States</i> , No. 86-234 (June 24, 1987)	3, 4
<i>United States v. Perholtz</i> , 836 F.2d 554 (D.C. Cir. 1988)	6
<i>United States v. Richerson</i> , 833 F.2d 1147 (5th Cir. 1987)	6
<i>United States v. Young</i> , 470 U.S. 1 (1985)	4, 6

Statutes:

18 U.S.C. 371	1
18 U.S.C. 1341	2, 5
18 U.S.C. 1952	2



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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 835 F.2d 517.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1987. A rehearing petition was denied on February 2, 1988 (Pet. App. 14a). The petition for a writ of certiorari was filed on March 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiracy to commit mail fraud and to use interstate facilities in aid of commercial bribery, in violation of 18 U.S.C. 371; use of interstate facilities to facilitate com-

mercial bribery, in violation of 18 U.S.C. 1952; and mail fraud, in violation of 18 U.S.C. 1341.¹ Petitioner was sentenced to two years' imprisonment on the conspiracy count; two-year terms of imprisonment were imposed on the bribery and mail fraud counts, but were suspended in favor of five years' probation on each count. The court of appeals affirmed (Pet. App. 1a-13a).

The evidence at trial, which was summarized by the court of appeals (Pet. App. 2a) and is described more fully in the government's brief below (Gov't C.A. Br. 5-10), showed that petitioner participated in a commercial kickback scheme. After United Engineers & Constructors obtained a construction contract to perform repairs at an electric generating plant owned by Delmarva Power and Light Company, it awarded a subcontract to the Union Boiler Company. Union Boiler then learned through United Engineers' purchasing agent, Timothy McCuen, that it could increase its bid by \$303,000 and still obtain the subcontract. Union Boiler did so and the \$303,000 was divided among the participants in the scheme. Part of the kickback money was laundered through petitioner's company, and he received \$8,829 for his services.

The district court's instructions to the jury focused on both tangible and intangible property interests. The instruction on the substantive mail fraud counts stated that the government had to prove beyond a reasonable doubt that petitioner "devised a scheme or artifice to defraud United Engineers of its right to the honest, faithful and loyal services of its employee, Timothy McCuen, and

¹ Petitioner was acquitted on two mail fraud counts; co-defendant Gerald Profita was convicted on all five counts; and co-defendant Philip Vallese was acquitted on all counts.

further, to defraud both United Engineers and Delmarva Power and Light Company of money" (C.A. App. 605a).² With respect to the intangible rights allegation in the mail fraud counts, the court further instructed that "McCuen was under a duty to act in United Engineers best interest and to disclose and reveal to United Engineers all information [of] which he was aware that was material to the conduct of United Engineers' business[.] * * * * [Y]ou may find the existence of a scheme to defraud United Engineers of McCuen's honest and faithful services if you determine McCuen failed to disclose material information to United Engineers and the non-disclosure was capable of causing or actually did cause business harm to United Engineers. However, proof of actual monetary or economic loss by United Engineers is not necessary." Pet. 6-7; see also Pet. App. 11a; C.A. App. 607a-608a. Petitioner did not object to the jury instructions.

On appeal, petitioner contended that the court's charge permitted conviction for conduct that did not constitute a federal crime in light of this Court's decision in *McNally v. United States*, No. -86-234 (June 24, 1987), which was decided about two months after petitioner was sentenced. A divided court of appeals affirmed the conviction (Pet. App. 1a-13a). Applying the plain error standard in view of petitioner's failure to object to the jury instructions at trial (*id.* at 4a), the court found from the context of the entire trial that "the jury could not, given the totality of the instructions, have convicted [petitioner] unless it found that an object of the scheme in which he participated was to

² In explaining the conspiracy allegation, the court similarly charged that petitioner could be convicted of conspiring to commit mail fraud only if the government proved that he had conspired to deprive United Engineers of the honest services of its employee and to deprive the two companies of money (C.A. App. 589a-590a, 594a).

obtain money from Delmarva Power” (*id.* at 7a). The court noted that “[i]n addition to consistently referring to the alleged scheme as one to, *inter alia*, defraud Delmarva Power of money, the district court clearly instructed the jury that, before it could convict [petitioner] of mail fraud, it must find that the government proved beyond a reasonable doubt ‘that [he] devised a scheme or artifice to defraud United Engineers of its right to the honest, faithful and loyal services of its employee, Timothy McCuen, and further, to defraud both United Engineers and Delmarva Power and Light Company of money’ ” (*ibid.* (emphasis in original)).

ARGUMENT

The court of appeals did not err. Petitioner must show that the jury instructions to which he did not object “undermined the fairness of the trial and contributed to a miscarriage of justice.” *United States v. Young*, 470 U.S. 1, 17 n.14 (1985). When the instructions are considered as a whole and in the context of the entire trial, it is clear that no such error was committed here. Moreover, this case presents no important issue of law, but instead merely presents the question whether, under the facts of this case, the court of appeals correctly concluded that petitioner was not prejudiced by instructions given prior to this court’s decision in *McNally*. Accordingly, further review is not warranted.

The Court explained in *McNally* that the mail fraud statute requires proof that the defendant devised a scheme to defraud someone of money or property. Looking to the jury instructions in that case, it reversed the convictions because “there was *nothing* in the jury charge that required” the jury to find a scheme to defraud anyone of property (slip op. 11 (emphasis added)). All that the jury

in *McNally* had to find to convict was that the State had been deprived of an "ethereal" interest in the honest and faithful service of an employee. See *Carpenter v. United States*, No. 86-422 (Nov. 16, 1987), slip op. 6.

In *Carpenter*, the Court made clear that the property protected by the mail fraud statute includes intangible property, stating that "*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights" (slip op. 6). The Court went on to explain that " 'a person who acquires special knowledge or information by virtue of a * * * fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom' " (slip op. 8 (citation omitted)). Thus, where the jury instructions require a finding that an employer was deprived of a property interest, whether tangible or intangible, a mail fraud conviction is not invalid.

Under *McNally* and *Carpenter*, it appears that the intangible rights portion of the jury instructions was not erroneous. While the jury charge contained language that would not be included in instructions given today, the court plainly tied the deprivation of McCuen's honest services to United Engineers' property interests when it instructed that "you may find the existence of a scheme to defraud United Engineers of McCuen's honest and faithful services if you determine McCuen failed to disclose material information to United Engineers and the non-disclosure was capable of causing or actually did cause business harm to United Engineers" (Pet. 6; C.A. App. 607a-608a). There is nothing ethereal about that charge. Under it, the jury was instructed that the government had to show that United Engineers was defrauded of a property interest when McCuen devised a scheme to profit from its award of subcontracts, just as in *Carpenter*

the Wall Street Journal was defrauded of a property interest when the defendants traded on their knowledge of what the Journal would publish.

Moreover, the jury in this case was instructed that to convict petitioner it had to find that he devised a scheme to defraud United Engineers of both intangible rights *and* money. That the jury was charged that it had to find both objects of the fraud shows that it could not have convicted petitioner solely on an intangible rights theory. See *United States v. Perholtz*, 836 F.2d 554, 559 (D.C. Cir. 1988). Thus, even if the intangible rights portion of the charge was improper, no harm occurred since, under the instructions here, unlike the instructions in *McNally*, the jury had to conclude that petitioner participated in a scheme to obtain money.

In addition, since petitioner must show that a miscarriage of justice occurred because he did not object to the instructions at trial (*Young*, 470 U.S. at 17 n.14), the contested instruction must be read in the context of the evidence presented at trial. As the court of appeals concluded, given that the case was prosecuted under the theory that \$303,000 was obtained through the fraudulent kickback scheme, "the jury could not * * * have convicted [petitioner] unless it found that an object of the scheme in which he participated was to obtain money" (Pet. App. 7a). See *United States v. Richerson*, 833 F.2d 1147, 1157 (5th Cir. 1987) (conviction upheld, despite a challenge under *McNally*, where "the overriding and predominant theory of the Government's case involved [the employer's] loss of money and property" through the scheme). It is implausible on the trial record of this case that the jury, which convicted petitioner of using interstate facilities to facilitate commercial bribery, would also have convicted petitioner for devising a mail fraud scheme that did not

result in a property loss to the victims of the scheme. Accordingly, no miscarriage of justice occurred and a new trial is not required.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

SARA CRISCITELLI
Attorney

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